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Supreme Court, U.S.
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No. 03-66

IN THE

Supreme Court of the United States

KISKA CONSTRUCTION CORPORATION - U.S.A. AND KAJIMA ENGINEERING AND CONSTRUCTION, INC., PARTNERS IN KISKA-KAJIMA, A JOINT VENTURE,

Petitioners,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO BRIEF IN OPPOSITION

KENNETH W. STARR
Counsel of Record
CHRISTOPHER LANDAU
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

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INTRODUCTION

The most striking thing about WMATA's opposition brief is that it does not even *purport* to defend the D.C. Circuit's replacement of the WMATA Compact's textual governmental/proprietary distinction with the FTCA's discretionary/ministerial distinction. Instead, WMATA simply tries to change the subject, arguing that (1) KiSKA did not present this "issue" below, Opp. 5-6; (2) the dismissal of KiSKA's tort claims is at most harmless error, because KiSKA "had its day in court" on its contract claims, Opp. 3, 4, 9; and (3) the questions presented in the petition are not important in any event, Opp. 3, 8. Each of these arguments, as explained below, is manifestly incorrect. But, more important, none of these arguments negates the critical points that (1) the D.C. Circuit has concededly rewritten the express terms of the WMATA Compact, and (2) no further percolation in the lower courts on this point can reasonably be expected. Indeed, WMATA characterizes the relevant law as "settled," Opp. 2, 3, as if this Court had no business meddling in this area. That approach, if anything, underscores that this Court's review is not only warranted but overdue. The D.C. Circuit should not have the last word on the interpretation of an interstate Compact signed by sovereign States and ratified by Congress; that is the solemn "function and duty of the Supreme Court of the Nation." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951). Because the decision below is not even arguably rooted in the text of the WMATA Compact, and the issue has been fully played out in the lower courts, this Court should grant *certiorari* and reverse the judgment.

ARGUMENT

I. WMATA's Waiver Argument Is Groundless.

WMATA begins its opposition by arguing that KiSKA "did not present the first question in its Petition to the D.C. Circuit," and thus "should not be permitted to first raise this *issue* before

the Supreme Court." Opp. 5 (emphasis added). That argument reveals a fundamental misunderstanding of appellate procedure.

WMATA does not seriously dispute that the D.C. Circuit replaced the WMATA Compact's governmental/proprietary distinction with the FTCA's discretionary/ministerial distinction in *Sanders v. WMATA*, 819 F.2d 1151, 1155 (1987), and has consistently followed that approach ever since. *See* Opp. 2-3; Pet. 15; Pet. App. 10a. Accordingly, it would have been futile for KiSKA to argue this case below under the governmental/proprietary distinction, given that the panel was bound by *Sanders* and subsequent cases to apply the discretionary/ministerial distinction. *See, e.g., In re Cheney*, 334 F.3d 1096, 1107 (D.C. Cir. 2003) (panels bound by circuit precedent). Contrary to WMATA's assertion, KiSKA did not "embrace[]" the FTCA's discretionary/ministerial distinction below, Opp. 2 n.2, 5, but simply acknowledged that distinction as binding circuit law. Needless to say, litigants are not required to engage in futile gestures to preserve an argument for this Court's review. *See, e.g., Osborne v. Ohio*, 495 U.S. 103, 125 (1990); *cf. Ohio v. Roberts*, 448 U.S. 56, 74 (1980) ("The law does not require the doing of a futile act.").

In any event, the entire premise of WMATA's argument is wrong, because WMATA overlooks the fundamental distinction between *issues* and *arguments*. The *issue* presented here is whether KiSKA's tort claims against WMATA are barred by sovereign immunity. There is no question that KiSKA presented this *issue* below: as the D.C. Circuit explained, "[o]n appeal, KiSKA argues that the district court erred by dismissing its two tort claims—fraudulent misrepresentation and negligent misrepresentation—on sovereign immunity grounds." Pet. App. 9a. What WMATA is essentially saying is that KiSKA did not present a specific *argument* in support of that issue: that the D.C. Circuit has gone astray since 1987 by analyzing WMATA's sovereign immunity from tort claims by reference to the FTCA's

discretionary/ministerial distinction rather than the WMATA Compact's textual governmental/proprietary distinction. It is axiomatic, however, that once an *issue* is properly presented, "a party can make any *argument* in support of [its position]; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) (emphasis added); *see also Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000). KiSKA is not raising a new *issue* here; it is merely raising an *argument* that was foreclosed below by settled circuit precedent.

Moreover, even if KiSKA's *argument* regarding the D.C. Circuit's interpretation of the WMATA Compact were considered a distinct *issue*, "[o]ur practice permits review of an issue not pressed so long as it has been passed upon" by the lower court. *Lebron*, 513 U.S. at 379 (internal quotation and brackets omitted); *see also United States v. Williams*, 504 U.S. 36, 41 (1992); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *Stevens v. Department of Treasury*, 500 U.S. 1, 8 (1991). Here, there is no question that the D.C. Circuit "passed upon" the first question presented in the petition:

> Because "the distinction between proprietary and governmental functions has created a 'quagmire that has long plagued the law of municipal corporations,'" *Beatty [v. WMATA]*, 860 F.2d [1117,] 1126 [(D.C. Cir. 1988)] (quoting *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955)), we have interpreted section 80 "as incorporating the distinction between discretionary and ministerial functions," a dichotomy set forth in the Federal Tort Claims Act ("FTCA"), *Dant v. District of Columbia*, 829 F.2d 69, 74 (D.C. Cir. 1987). Given that "[o]nly those activities

> considered 'discretionary' are shielded by sovereign immunity," *Burkhart v. WMATA*, 112 F.3d 1207, 1216 (D.C. Cir. 1997), WMATA's immunity "turns on whether the [challenged] activity is 'discretionary' or 'ministerial,'" *Beebe [v. WMATA]*, 129 F.3d [1283,] 1287 [(D.C. Cir. 1997)].

Pet. App. 10a. If that is not "passing upon" the first question presented in the petition, it is hard to know what is. Indeed, this Court routinely reviews the decisions of lower courts bound by prior precedent. *See, e.g., City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 431 (2002); *Carter v. United States*, 530 U.S. 255, 260 (2000). Accordingly, WMATA's waiver argument is groundless.

II. WMATA's Harmless-Error Argument Is Groundless.

WMATA next argues that any error in dismissing KiSKA's tort claims is harmless, because KiSKA already "had its day in court" by receiving "a five-week trial on its contract claims," which were "predicated on the same facts" as its dismissed tort claims. Opp. i, 1, 3, 4, 9. Under this view, "[a] party alleging concealment has a clear remedy for that claim," Opp. 7: it can sue in contract, not tort. That argument too is baseless.

As an initial matter, the D.C. Circuit did not address WMATA's harmless-error argument below; to the contrary, that court affirmed the dismissal of KiSKA's tort claims *on the merits* and expressly declined to reach that argument. *See* Pet. App. 16a n.14. Accordingly, the D.C. Circuit's ruling on the tort claims is squarely presented here, and WMATA's harmless-error argument provides no basis for insulating that ruling from this Court's review.

In any event, the argument fails on its own terms. KiSKA's tort claims allege that WMATA wrongfully induced KiSKA to *enter into* the contract by concealing and/or misrepresenting material facts. Thus, as a matter of law and logic, it makes no

sense to say that the exclusive remedy for those claims lies *under* the contract: the tort of fraudulent inducement of a contract is separate from, and antecedent to, any breach of that contract. *See, e.g., McDonald v. Johnson & Johnson*, 776 F.2d 767, 768 (8th Cir. 1985) (characterizing the argument that an adverse contract verdict precludes a fraudulent-inducement verdict as "bordering on the frivolous"). Whether a defendant breached its obligations under a contract simply has nothing to do with whether the defendant fraudulently induced the plaintiff to enter into the contract in the first place.[1]

WMATA's insistence that the "same facts" underlie both KiSKA's tort and contract claims, Opp. 1, is meaningless. KiSKA's dismissed tort claims involve different elements and different defenses than its adjudicated contract claims, so that KiSKA did not need to prove that WMATA breached the contract in order to prove fraud, and, conversely, KiSKA did not need to prove that WMATA committed fraud in order to prove a breach. Whether some of the same evidence may have supported both claims is legally irrelevant. *Cf. United States v. Felix*, 503 U.S. 378, 386 (1992) (reliance on same evidence irrelevant in determining whether subsequent prosecution barred by double jeopardy). Because the jurors here returned a general verdict, there is no way of knowing why they rejected KiSKA's contract claims, and thus "it is not clear" whether they addressed any (much less all) of the issues presented in the dismissed tort claims. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 799 (1973); *cf. United States v. Watts*, 519 U.S. 148,

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[1] WMATA tries to blur the record on this point by asserting that the D.C. Circuit "*expressly found* that 'the covenant of good faith and fair dealing undoubtedly constrains WMATA's behavior within the context of its contractual relationships.'" Opp. 7 (emphasis added; quoting Pet. App. 12a). That assertion is false. Indeed, the D.C. Circuit said just the opposite: "*Although* the covenant of good faith and fair dealing undoubtedly constrains WMATA's behavior within the context of its contractual relationships, *KiSKA's misrepresentation claims sound in tort, not contract*." Pet. App. 12a (emphasis added).

155 (1997) ("[T]he jury cannot be said to have 'necessarily rejected' any facts when it returns a general verdict.").

Indeed, WMATA's current insistence that this case is all about contract, not tort, stands in stark contrast to its position below that this case is all about tort, not contract. When urging the district court to dismiss the tort claims on sovereign immunity grounds, WMATA insisted that *all* of KiSKA's claims sounded in tort, not contract. "Each count of KiSKA Kajima's complaint lies in tort or is derivative of an allegation that lies in tort." WMATA's Reply To Pls.' Opp. To Mot. To Dismiss (10/26/99), at 16; *see also id.* at 17-18 ("KiSKA-Kajima is not attempting to hold WMATA to its contract, but, as KiSKA-Kajima admits, its claims are 'grounded in fraud and misrepresentation.' These are not breach claims, but rather tort claims masquerading as such. ... KiSKA-Kajima is attempting to maintain an action in tort, and as alternative grounds has dressed up its allegations as a contract claim."). It may suit WMATA now to change its tune as a matter of litigation tactics, but it cannot change the law. The jury's rejection of KiSKA's contract claims in no way forecloses KiSKA from pursuing relief in tort.

III. WMATA's Attempts To Downplay The Importance Of This Case Are Groundless.

WMATA finally attempts to downplay the importance of the questions presented in the petition on a variety of grounds, all of which are meritless.

First, WMATA contends that this Court's review is unwarranted because "there is no split in the federal circuits." Opp. 6. But the whole point of waiting for a circuit split is to allow further percolation in the lower courts that will help flesh out an issue, and highlight competing viewpoints, to facilitate this Court's ultimate review. Here, no such percolation can reasonably be expected because, as a practical matter, the questions presented arise only in the Washington D.C.

metropolitan area, and the Fourth Circuit, *over a vigorous dissent*, recently decided to follow the D.C. Circuit in construing the WMATA Compact precisely to avoid a circuit split. *See Smith v. WMATA*, 290 F.3d 201, 207 & n.9 (4th Cir. 2002); *id.* at 219-20 (Michael, J., dissenting); *see also McKethean v. WMATA*, 588 A.2d 708, 712-13 (D.C. 1991) (reversing prior precedent and following the D.C. Circuit on this point because "[w]hether an activity is proprietary or governmental [within the meaning of the Compact] is a question of federal law"). The competing positions have thus been fully fleshed out in the lower courts, and the issue is ripe for this Court's review. Indeed, if WMATA's self-serving perception of the law as "settled" is to be credited, Opp. 2, 3, the issue may be *overripe*. Certainly, this Court should not allow an explicitly anti-textual interpretation of an interstate Compact to become the law of the land by default. *See, e.g., Demarest v. Manspeaker*, 498 U.S. 184, 190 & n.* (1991) (granting *certiorari* and reversing notwithstanding circuit-court unanimity on point); *McNally v. United States*, 483 U.S. 350, 355 (1987) (same).

Second, WMATA contends that this Court's review is unwarranted because "the Petition presents an unusual and unique issue limited to a single, local governmental entity—WMATA." Opp. 8. This "don't-mind-little-old-WMATA" approach is preposterous. WMATA is not just a run-of-the-mill "local governmental entity," but the creature of an interstate Compact among the District of Columbia, the State of Maryland, and the Commonwealth of Virginia that was duly ratified by the Congress of the United States pursuant to the Compact Clause of the Constitution, Art. I, § 10, cl. 3. WMATA is a frequent litigant in the lower courts, and, as noted in the petition, the scope of its tort liability is a recurring issue. *See* Pet. 13-15, 18-19. So it is simply not true that the questions presented here have "very limited application," Opp. 3, even with respect to WMATA. *Cf. Hess v. Port Authority Trans-*

Hudson Corp., 513 U.S. 30, 32-33 (1994) (granting review to address the sovereign immunity of a particular bistate railway created under the Compact Clause). But the questions presented here extend well beyond WMATA: they call upon this Court to clarify the appropriate judicial role in interpreting interstate Compacts, and the scope of "governmental" and/or "discretionary" sovereign immunity in the context of quasi-governmental entities. *See Amicus* Br. of the General Contractors Ass'n of New York, Inc. at 2 (underscoring the importance of these issues to government contractors).

Third, WMATA contends that this Court's review is unwarranted because WMATA predicts that it would prevail on KiSKA's tort claims in any event. *See* Opp. 2, 8-9. According to WMATA, the information withheld from KiSKA during the bidding process was not "material," and consisted only of "superceded" [*sic*] "draft reports" that "had been made available for review" in any event. Opp. 2 n.3. But that is just wishful thinking. There have never been any findings along those lines, and KiSKA vigorously contests WMATA's self-serving characterization of the facts. The issue here is not which party ultimately might prevail on the merits; it is whether KiSKA is entitled to litigate its tort claims in the first place.

Fourth, WMATA contends that this Court's review is unwarranted because the D.C. Circuit simply applied the principle that "[w]aivers of sovereign immunity are narrowly construed." Opp. 9. But the problem here is not that the D.C. Circuit "narrowly" construed the WMATA Compact's waiver of sovereign immunity; it is that *the D.C. Circuit did not construe the WMATA Compact's waiver of sovereign immunity at all*, but instead construed the FTCA's waiver of sovereign immunity. Under no circumstances can "discretionary" activity be considered a "narrow" construction of "governmental" activity; to the contrary, some discretionary activities are non-governmental, and some governmental activities are non-discretionary. The two concepts are simply different in origin

and meaning. *See, e.g., Indian Towing*, 350 U.S. at 68 (distinguishing between FTCA's discretionary/ministerial distinction and common-law governmental/proprietary distinction); *Owen v. City of Independence*, 445 U.S. 622, 644-50 (1980) (same).

Finally, WMATA contends that this Court's review is unwarranted because the D.C. Circuit correctly applied the discretionary/ministerial distinction by holding that WMATA has "discretion" to conceal material information from its contractors to induce artificially low bids, and that the exercise of such "discretion" is grounded in policy considerations. Opp. 8-9. WMATA does not deign, however, to respond to any of the contrary arguments raised in the petition, *viz.*:

> (1) the D.C. Circuit reversed the burden of proof by requiring KiSKA to prove that WMATA's challenged conduct was *not* discretionary rather than requiring WMATA to prove that such conduct *was* discretionary, Pet. 20-21;
>
> (2) the D.C. Circuit's interpretation of the discretionary/ministerial exception is inconsistent with the FTCA's *separate* exception to the waiver of sovereign immunity for "[a]ny claim arising out of ... misrepresentation, deceit, or interference with contract rights," 28 U.S.C. § 2680(h), Pet. 21-22;
>
> (3) the D.C. Circuit's conclusion that WMATA has "discretion" to conceal material information from contractors ignores a solid wall of precedent holding that governmental entities have *no* such discretion, not to mention a specific provision of a Federal Transit Administration Circular providing that WMATA's contract solicitations must "[i]ncorporate a clear and accurate description of the technical requirements for the material,

product, or service to be procured," FTA Circular 4220.1D ¶ 8(c)(1), Pet. 22-24 & n.4; and

(4) in any event, even if WMATA had "discretion" to conceal material information from its contractors, such "discretion" would not implicate the exercise of a legitimate policy choice protected by sovereign immunity, Pet. 24-25.

Rather than responding to a single one of these points, WMATA simply parrots the D.C. Circuit's assertion that KiSKA's position "'would permit endless contractor challenges to WMATA's final specifications,'" Opp. 9 (quoting Pet. App. 15a), as if the WMATA Compact's waiver of sovereign immunity were to be analyzed solely by reference to WMATA's convenience.

The bottom line here is that the D.C. Circuit has essentially written the limited waiver of sovereign immunity for tort claims out of the WMATA Compact. Because that result has no arguable basis in the text of the Compact itself, gives WMATA *carte blanche* to commit fraud, and cannot reasonably be expected to be remedied through further percolation in the lower courts, this Court should grant review.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, this Court should grant review.

Respectfully submitted,

KENNETH W. STARR
Counsel of Record
CHRISTOPHER LANDAU
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

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